IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 991

MARY HARE STANLEY,
Petitioner,

vs.

THEODORE HAWKINS STANLEY,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Court:

Respondent prays that this Court refuse to grant Petitioner's Motion to file her Petition for Writ of Certiorari or, in the alternative, if leave be granted to file same, that such petition be denied for the following reasons:

JURISDICTION.

A. A Federal Question Cannot Be Raised for the First Time in a Petition for Rehearing After Judgment in the Highest Court of a State, So As to Bring the Case Within the Appellate Jurisdiction of the United States Supreme Court.

(*Waters-Pierce Oil Company* v. *State of Texas*, 29 S. Ct. 227, 212 U. S. 112; *Weber* v. *Rogan*, 23 S. Ct. 263, 188 U. S. 10; 22 Fed. Digest, Courts, Key 396 (6).)

The first time any Federal question was raised or attempted to be raised was in Petitioner's Motion for Rehearing filed in the Supreme Court of Texas. Respondent attaches hereto as Appendix A, p. A1, the points of error raised in the Court of Civil Appeals; as Appendix B, p. A5, the points of error raised in Motion for Rehearing in the Court of Civil Appeals; and, as Appendix C, p. A12, the points of error raised in Application for Writ of Error in the Supreme Court of Texas.

Petitioner had ample opportunity to raise the alleged Federal question on any one of these three occasions and failed to do so. In fact, after filing the original application for Writ of Error in the Supreme Court of Texas, petitioner filed a Supplemental Brief on December 5, 1956, and failed to mention or raise any Federal question.

This Court has further held, and it is well settled, THAT AN ASSERTION IN A STATE COURT IN A PETITION FOR REHEARING, THAT A FEDERAL RIGHT EXISTS, IS NO GROUND FOR INVOKING APPELLATE JURISDICTION OF THE FEDERAL SUPREME COURT, UNLESS THE STATE COURT PASSES ON THE FEDERAL GROUND RELIED UPON (*Live Oak Water Users Assn.* v. *Railroad Commission of State of California*, 46 S. Ct. 149, 269 U. S. 354; *Brown* v. *State of Colorado*, 1 S. Ct. 175, 106 U. S. 95; *Santa Cruz County* v. *Santa Cruz R. Co.*, 4 S. Ct. 474, 111 U. S. 361; *Miller* v. *Texas*, 14 S. Ct. 874, 153 U. S. 535).

B. No Federal Question Exists.

The petitioner seeks to present to this Court for review a *FACT QUESTION* bearing upon the SUFFICIENCY OF THE EVIDENCE IN THE TRIAL COURT. A fact question which was determined against petitioner in the

trial court, approved by the Court of Civil Appeals and the Supreme Court of Texas.

Article 4619, Vernon's Revised Civil Statutes of Texas, is simply a rule of evidence which requires the spouse who is claiming property acquired during marriage as "separate" property to "satisfactorily" prove that it is.

No court in Texas has ever held the above statute to be a "conclusive" presumption. The word "conclusive" is applied solely by petitioner and is used as an excuse for failing to meet the Burden of Proof to establish the separate character of the property involved. To illustrate the truth of this statement, respondent attaches as Appendix D, p. A21, hereof, his First and Second Counter Points in the Supreme Court of Texas which clearly and forcefully show that Article 4619 was not applied in this case as a "*conclusive*" presumption.

C. Federal Courts Have Followed Approved and Applied Article 4619, R. C. S. Texas, the Very Statute Attacked by Petitioner.

In the case of *Phillips* v. *Vitemb*, 235 F. 2d 11, the United States Fifth Circuit Court cites and follows the Supreme Court of Texas in *Hedge* v. *Ellis*, 154 Tex. 341, 277 S. W. 2d 900; *Rippy* v. *Rippy*, 49 S. W. 2d 494, together with other cases which have been approved and followed in Texas for countless years.

STATEMENT OF THE CASE.

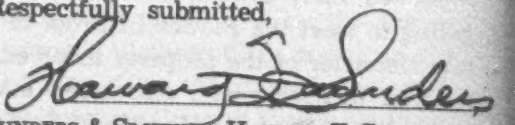
Respondent respectfully excepts to petitioner's argumentative and colored STATEMENT on Pages 4-8 in her petition. Respondent here adopts and submits the STATEMENT as set forth by the majority opinion of the Honor-

able Court of Civil Appeals, Seventh Supreme Judicial District of Texas. (See Appendix A. App. 22-25, Petitioner's Writ or 294 S. W. 2d 132).

CONCLUSION.

For the reasons set forth above, the Petition for Writ of Certiorari should in all things be refused and denied.

Respectfully submitted,



SANDERS, SCOTT, SAUNDERS & SMITH,
C. J. HUMPHREY, Member of Firm,
Amarillo, Texas,

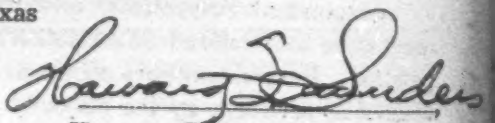
HOWARD F. SAUNDERS,
730 Amarillo Bldg.,
Amarillo, Texas,

Attorneys for Theodore Hawkins Stanley.

PROOF OF SERVICE.

I, Howard F. Saunders, one of the attorneys for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of May, 1957, I served copies of the foregoing Reply to Petitioner's Writ of Certiorari on petitioner by mailing copies thereof in duly addressed envelope, with adequate prepaid postage, to her attorneys of record as follows:

Cleo G. Clayton, Jr.
Simpson, Clayton & Fullingim
210 First National Bank Bldg.
Amarillo, Texas



HOWARD F. SAUNDERS.

APPENDIX A.

Petitioner's Points of Error upon Which Appeal to Court of Civil Appeals Was Predicated.

POINT NUMBER ONE.

The trial court erred in finding that Appellant had forfeited her separate estate in exercising her lawful control over her separate estate by successfully risking her sizable separate estate in order to create a community estate without any assistance from the husband or his separate estate, although he had the lawful obligation to provide a community estate for support purposes, because the declaration of forfeiture of Appellant's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER TWO.

The trial court erred in forfeiting the separate estate of Appellant on the basis that she exercised her lawful right to the sole management, control and disposition of her separate property and estate during the marriage of Appellant and Appellee and in considering her exercise of and control over her separate property and estate as such a "wrongful" conduct as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER THREE.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the community estate, if any, mixed with the separate estate of Appellant was property of like character, kind and value, and the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were each identifiable, one from the other.

POINT NUMBER FIVE.

The trial court erred in finding that the separate estate of Appellant had been so commingled with the community estate of Appellant and Appellee as to have lost its identity because the record reflects that the separate estate of Appellant had consistently, during the marriage of Appellant and Appellee, earned profits and that withdrawals from the community estate and the separate estate of Appellant exceeded the community estate and that, therefore, only the separate estate of Appellant remained.

POINT NUMBER SIX.

The trial court erred in holding that the burden of proof rested upon Appellant to establish that the separate estate of Appellant was entitled to reimbursement of the value of capital taken from such separate estate for the

use and benefit of the community estate because, upon dissolution of the marriage, where Appellant has contributed, as in this case, capital for the benefit of the community estate, Appellant is entitled to withdraw the value of the capital contributed by her separate estate, and the Appellee in wishing to take the position that the separate estate of Appellant is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of Appellant's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Appellee.

POINT NUMBER SEVEN.

The trial court erred in holding that all the property remaining at the time of the separation of Appellant and Appellee was community property because the evidence adduced on the trial hereof discloses that all the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Appellant was likewise expended toward community debts and usages, and therefore, there remained nothing in property other than the separate estate of the Appellant at such time.

POINT NUMBER EIGHT.

The trial court erred because it abused its discretion in adjudicating the respective rights of Appellant and Appellee herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Appellant and Appellee before applying community charges and expenses against the separate estate of Appellant in the determination of the property rights of the respective parties.

POINT NUMBER NINE.

The trial court erred in finding, contrary to the evidence, that Appellee did not, by his acts, consent, acquiescence and conduct give to Appellant as her separate estate all the income, rents, revenues, increases and earnings of Appellant realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The trial court erred in finding, contrary to the evidence, that the community estate of Appellant and Appellee was not indebted to the separate estate of Appellant because the evidence adduced at the trial hereof shows that the separate estate of Appellant was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The trial court erred in failing to find that Appellee is indebted to the separate estate of Appellant because of loans made from the separate estate of Appellant to Appellee because the evidence shows that monies or properties of the separate estate of Appellant were advanced to Appellee on the basis that such separate estate would be repaid by Appellee.

POINT NUMBER TWELVE.

The trial court erred, under the evidence in this case, in finding that the expenditure of the fruits and revenues from the wife's separate property became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of the wife's property

were expended for the upkeep and management of her separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of the wife.

APPENDIX B.

Petitioner's Points of Error in Motion for Rehearing Before Court of Civil Appeals.

POINT NUMBER ONE.

The trial court erred in finding that Appellant had forfeited her separate estate in exercising her lawful control over her separate estate by successfully risking her sizable separate estate in order to create a community estate without any assistance from the husband or his separate estate, although he had the lawful obligation to provide a community estate for support purposes, because the declaration of forfeiture of Appellant's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Appellant and Appellee.

POINT NUMBER TWO.

The trial court erred in forfeiting the separate estate of Appellant on the basis that she exercised her lawful right to the sole management, control and disposition of her separate property and estate during the marriage of Appellant and Appellee and in considering her exercise of and control over her separate property and estate as such a "wrongful" conduct as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Appellant and Appellee.

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The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The trial court erred in applying the "commingling" doctrine to this case in adjudicating the property rights of Appellant and Appellee because the community estate, if any, mixed with the separate estate of Appellant was property of like character, kind and value, and the respective interests of the community estate of Appellant and Appellee and the separate estate of Appellant were each identifiable, one from the other.

POINT NUMBER FIVE.

The trial court erred in finding that the separate estate of Appellant had been so commingled with the community estate of Appellant and Appellee as to have lost its identity because the record reflects that the separate estate of Appellant had consistently, during the marriage of Appellant and Appellee, earned profits and that withdrawals from the community estate and the separate estate of Appellant exceeded the community estate and that, therefore, only the separate estate of Appellant remained.

POINT NUMBER SIX.

The trial court erred in holding that the burden of proof rested upon Appellant to establish that the separate estate of Appellant was entitled to reimbursement of the

value of capital taken from such separate estate for the use and benefit of the community estate because, upon dissolution of the marriage, where Appellant has contributed, as in this case, capital for the benefit of the community estate, Appellant is entitled to withdraw the value of the capital contributed by her separate estate, and the Appellee in wishing to take the position that the separate estate of Appellant is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of Appellant's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Appellee.

POINT NUMBER SEVEN.

The trial court erred in holding that all the property remaining at the time of the separation of Appellant and Appellee was community property because the evidence adduced on the trial hereof discloses that all the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Appellant was likewise expended toward community debts and usages, and therefore, there remained nothing in property other than the separate estate of the Appellant at such time.

POINT NUMBER EIGHT.

The trial court erred because it abused its discretion in adjudicating the respective rights of Appellant and Appellee herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Appellant and Appellee before applying community charges and expenses against the separate estate of Appellant in the determination of the property rights of the respective parties.

POINT NUMBER NINE.

The trial court erred in finding, contrary to the evidence, that Appellee did not, by his acts, consent, acquiescence and conduct give to Appellant as her separate estate all the income, rents, revenues, increases and earnings of Appellant realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The trial court erred in finding, contrary to the evidence, that the community estate of Appellant and Appellee was not indebted to the separate estate of Appellant because the evidence adduced at the trial hereof shows that the separate estate of Appellant was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The trial court erred in failing to find that Appellee is indebted to the separate estate of Appellant because of loans made from the separate estate of Appellant to Appellee because the evidence shows that monies or properties of the separate estate of Appellant were advanced to Appellee on the basis that such separate estate would be repaid by Appellee.

POINT NUMBER TWELVE.

The trial court erred, under the evidence in this case, in finding that the expenditure of the fruits and revenues from the wife's separate property became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of the wife's property were expended for the upkeep and management of her

separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of the wife.

In view of the action of this Honorable Court in arriving at the conclusions of law and findings of fact as stated in its opinion rendered, Appellant urges the following assignment of error in addition to those heretofore set forth in Appellant's Brief for the reasons stated in such assignment, to-wit:

POINT NUMBER THIRTEEN.

This Honorable Court of Civil Appeals erred in the method in which it considered the assignments of error presented in Appellant's Brief filed herein designated therein as points raised herein pertaining to the "sufficiency of the evidence" for the reason that this Court in rendering its majority opinion has in effect ruled that "evidence of any probative values" in support of the findings of the trial court determines that the findings and judgment of the trial court is not "contrary to the evidence or the overwhelming weight of all the evidence as to be clearly wrong and unjust."

POINT NUMBER FOURTEEN.

This Honorable Court erred in so basing its majority opinion upon isolated bits of evidence and testimony rather than resorting to the testimony and evidence as a whole to obtain a construction which would be placed thereon as a matter of law.

Appellant here respectfully says to the Court that it has not complied with Texas Rule of Civil Procedure 451 in that it has not decided on all issues presented by proper assignments of error raised herein by Appellant and in announcing in writing this Court's conclusions thereto, and Appellant hereby makes such failure of the Court and the complaint thereof as her assignment of error No. 15, to-wit:

POINT NUMBER FIFTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because this Honorable Court did not decide on issues presented to it by proper assignments of error herein by Appellant and announce in writing this Court's conclusions thereto.

APPENDIX C.

Petitioner's Points of Error in Application for Writ of Error in Supreme Court of Texas.

POINT NUMBER ONE.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding that Petitioner had forfeited her separate estate in exercising her lawful control over her separate estate in order to create a community estate because the declaration of forfeiture of Petitioner's estate under these circumstances is grossly inequitable and establishes a precedent inimical to the welfare of the marriage relation and was an abuse of the Court's discretion in adjudicating the respective property rights of Petitioner and Respondent.

POINT NUMBER TWO.

The Court of Civil Appeals erred in sustaining the trial court's forfeiting the separate estate of Petitioner on the basis that she exercised her lawful right to the sole management, control and disposition of her separate estate during the marriage and in considering her exercise of and control over her separate estate as such a "wrongful conduct" as would justify the application of the common law doctrine of "commingling" in adjudicating the respective property rights of Petitioner and Respondent.

POINT NUMBER THREE.

The Court of Civil Appeals erred in sustaining the action of the trial court in applying the "commingling doctrine" to this case in adjudicating the property rights of Petitioner and Respondent because the respective inter-

ests of the community estate of Petitioner and Respondent and the separate estate of Petitioner were at all times apportionable, one from the other.

POINT NUMBER FOUR.

The Court of Civil Appeals erred in sustaining the action of the trial court in applying the "commingling doctrine" to this case in adjudicating the property rights of Petitioner and Respondent because the community estate, if any, mixed with the separate estate of Petitioner was property of like character, kind and value, and the respective interests of the community estate of Petitioner and Respondent and the separate estate of Petitioner were each identifiable, one from the other.

POINT NUMBER FIVE.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding that the separate estate of Petitioner had been so commingled with the community estate of Petitioner and Respondent as to have lost its identity because the record reflects that the separate estate of Petitioner had consistently, during the marriage of Petitioner and Respondent, earned profits and that withdrawals from the community estate and the separate estate of Petitioner exceeded the community estate and that, therefore, only the separate estate of Petitioner remained.

POINT NUMBER SIX.

The Court of Civil Appeals erred in sustaining the action of the trial court in holding that the burden of proof rested upon Petitioner to establish that the separate estate of Petitioner was entitled to reimbursement of the value of capital taken from such separate estate for the use and benefit of the community estate because, upon dissolution

of the marriage, where Petitioner has contributed, as in this case, capital for the benefit of the community estate, Petitioner is entitled to withdraw the value of the capital contributed by her separate estate, and Respondent in wishing to take the position that the separate estate of Petitioner is not entitled, upon dissolution of the marriage, to withdraw such value of the capital of the Petitioner's separate estate so contributed to the community estate is required to meet the burden of pleading and proving such contention as here made by Respondent.

POINT NUMBER SEVEN.

The Court of Civil Appeals erred in sustaining the action of the trial court finding that all property remaining at the time of the separation of Petitioner and Respondent was community property because the evidence adduced on the trial hereof discloses that all of the community estate acquired, if any, was expended for community debts and usages, and that, in addition thereto, a portion of the separate estate of Petitioner was likewise expended toward community debts and usages and, therefore, there remained nothing in property other than the separate estate of the Petitioner at such time.

POINT NUMBER EIGHT.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court abused its discretion in adjudicating the respective rights of Petitioner and Respondent herein for the reason that the trial court failed to apply community debts and expenses as charges first against the community estate of Petitioner and Respondent before applying community charges and expenses against the separate estate of Petitioner in determination of the property rights of the respective parties.

POINT NUMBER NINE.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court erred in finding, contrary to the evidence, that Respondent did not by his acts, consent, acquiescence and conduct give to Petitioner as her separate estate all the income, rents, revenues, increases and earnings of Petitioner realized from her separate estate and use thereof for gainful pursuit.

POINT NUMBER TEN.

The Court of Civil Appeals erred in sustaining the action of the trial court in finding, contrary to the evidence, that the community estate of Petitioner and Respondent was not indebted to the separate estate of Petitioner because the evidence adduced in the trial hereof shows that the separate estate of Petitioner was used to further the community estate and pay community obligations and, therefore, entitled to reimbursement therefor from the community estate, if any.

POINT NUMBER ELEVEN.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court failed to find that Respondent is indebted to the separate estate of Petitioner because of loans made from the separate estate of Petitioner to Respondent because the evidence shows that monies or properties of the separate estate of Petitioner were advanced to Respondent on the basis that such separate estate would be repaid by Respondent.

POINT NUMBER TWELVE.

The Court of Civil Appeals erred in sustaining the action of the trial court because the trial court erred, un-

der the evidence in this case, in finding that the expenditure of the fruits and revenues from Petitioner's separate estate became charges against her separate estate because the undisputed evidence reflects that the fruits and revenues of Petitioner's property were expended for the upkeep and management of her separate property FOR THE BENEFIT OF THE COMMUNITY, and such expenditures were reasonably necessary and proper for the purpose of such use in creating the community and, therefore, under principles of equity there should be no implied promise or determination that such expenditures should be repaid from or charged against the separate estate of Petitioner.

POINT NUMBER THIRTEEN.

The Court of Civil Appeals erred in the method in which it considered the Points of Error presented in Appellant's Brief filed herein as points raised pertaining to the "sufficiency of the evidence" for the reason that this court in rendering its majority opinion has in effect ruled that "evidence of any probative value" in support of the findings of the trial court determines that the findings and judgment of the trial court is not "contrary to the evidence or the overwhelming weight of all the evidence, as to be clearly wrong and unjust."

POINT NUMBER FOURTEEN.

The Court of Civil Appeals erred in basing its majority opinion upon isolated bits of evidence and testimony rather than resorting to the testimony and evidence as a whole to obtain a construction thereof which would be placed thereon as a matter of law.

POINT NUMBER FIFTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because this

Honorable Court did not decide on points presented to it by proper assignments of error herein by Petitioner and announce in writing its conclusions thereto.

POINT NUMBER SIXTEEN.

The Court of Civil Appeals erred in its majority opinion in failing to adopt the dissenting opinion filed herein which sustained Points Numbers One, Three, Four, Five, Seven, Eight and Ten as raised in Appellant's Brief.

POINT NUMBER SEVENTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number One of Appellant's Brief.

POINT NUMBER EIGHTEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Two of Appellant's Brief.

POINT NUMBER NINETEEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Three of Appellant's Brief.

POINT NUMBER TWENTY.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did

not decide the issues presented to it by proper assignment of error raised in Point Number Four of Appellant's Brief.

POINT NUMBER TWENTY-ONE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Five of Appellant's Brief.

POINT NUMBER TWENTY-TWO.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Six of Appellant's Brief.

POINT NUMBER TWENTY-THREE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Seven of Appellant's Brief.

POINT NUMBER TWENTY-FOUR.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Eight of Appellant's Brief.

POINT NUMBER TWENTY-FIVE.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Nine of Appellant's Brief.

POINT NUMBER TWENTY-SIX.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Ten of Appellant's Brief.

POINT NUMBER TWENTY-SEVEN.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Eleven of Appellant's Brief.

POINT NUMBER TWENTY-EIGHT.

The Court of Civil Appeals erred in not complying with Texas Rule of Civil Procedure No. 451 because it did not decide the issues presented to it by proper assignment of error raised in Point Number Twelve of Appellant's Brief.

POINT NUMBER TWENTY-NINE.

The Court of Civil Appeals, in sustaining the action of the trial court, committed fundamental error because the trial court and the Court of Civil Appeals considered the presumption that "all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved" as a presumption "of fact" rather than a presumption "of law" in determining the material issues affecting the property rights of Petitioner and Respondent.

POINT NUMBER THIRTY

The Court of Civil Appeals, in sustaining the action of the trial court, committed fundamental error because the trial court and Court of Civil Appeals considered that "mixing of dollars with dollars," in spite of a comprehensive accounting establishing at all times the monetary interests of the respective parties, was such a "commingling" as to justify the application of the common law "doctrine of commingling" and thereby forfeit the original separate funds of Petitioner and convert the same to a community property status of Petitioner and Respondent.

APPENDIX D.

First and Second Counter Points of Respondent's Reply Filed in Supreme Court of Texas.

FIRST COUNTER POINT.

The Court of Civil Appeals and the trial court correctly held that all property which is possessed by the husband and wife at the dissolution of the marriage is presumed to be community property unless the contrary is satisfactorily proved.

SECOND COUNTER POINT.

The trial court and the Court of Civil Appeals correctly held that no single item of property or money could be traced, (either in the original or converted form) to support the contention that same was petitioner's separate property, or separate money or purchased with her separate property. (Germane to petitioner's points 1 through 8, 12, 16, 29 and 30).

STATEMENT.

Respondent challenges the unsupported statement that $84,044.63 (earnings) and $41,911.13 from petitioner's separate estate was expended. This is not only false * * * it is impossible.

Respondent challenges the unsupported statement that the audit "reflects the separate estate had by this petitioner during each year of the marriage." The auditor testified to the contrary (S. F. p. 436, lines 4-8).

Nowhere does Petitioner attempt to describe the *property* on hand at the time of the divorce and point out

the testimony and evidence concerning it. With the court's permission, we will do so, and demonstrate to the Court that petitioner was unable to trace or identify, as her separate property, any specific piece of property which was on hand at the time of the divorce hearing.

1. *Cowboy Cafe*: The Contract of Sale (Defendant's Exhibit No. 3) and the Bill of Sale (Defendant's Exhibit No. 4), both reflect that the sale was made to Ted and Mary Stanley. The Auditor testified that it was not possible to determine whether its purchase price was paid out of money which Mrs. Stanley had prior to her marriage to Respondent or whether same was paid for out of earnings of the parties after the marriage (S. F. Page 364, lines 5 through 11). Mrs. Stanley testified, "You can pay me $4,000.00 and I will give you my part." (S. F. Page 99, lines 1 and 2).

2. *1955 Chevrolet Station Wagon, subject to indebtedness*: The respondent makes no contention that the equity in the automobile is not a portion of the community property estate, and no claim is made by petitioner that it is her separate property.

3. *Southern Finance Company assets in the amount of $10,198.20*: Mr. Likes testified in response to the following question as follows:

> Question—"There is no way that you right now can tell this Court what part of this $10,198.20 of capital that was left from all of these companies represents earnings during the period and represents capital that was on hand before the marriage?" (S. F. Page 352, lines 16-20).
>
> Answer—"That's right." (S. F. Page 354, line 14).

4. *The checking account in the amount of $807.91*: Mr. Likes gives the same answer as in the number immediately preceding (S. F. page 354).

5. *The Cashier's Check in the amount of $5,114.09*: Again Mr. Likes is unable to determine whether it was purchased from moneys on hand prior to the marriage or moneys which came from earnings during the marriage (S. F. Pages 354-355).

6. *Cash in Mrs. Stanley's possession—$1,000.00*: The Accountant apparently had no record of this cash on hand, and no attempt was ever made by the petitioner to establish that this sum of money was her separate property and estate.

7. *The home at 1511 Austin, with an agreed value of $26,300.00*: The evidence reflects that the property was conveyed to *respondent, T. H. Stanley*, reciting a consideration of $26,300.00, of which $18,392.09 is cash paid, and the assumption by *grantee* (*respondent*) of the unpaid balance due on a purchase money note, said balance at the time of purchase being $7,907.91 (Defendant's Exhibit No. 1). The petitioner admits that the property was conveyed to her sister Lula O. Fisher for the purpose of protecting the property from possible liabilities and indebtedness incurred as a result of the operation of The Nat Ball Room, and that such conveyance was without any consideration, and that the deed was back-dated (S. F. Pages 613-614). The petitioner further testified that she had obtained an unrecorded deed from her sister, Lula O. Fisher Vaughn and husband, and that no consideration of any kind was paid therefor. In this deed the grantee was Mary H. Stanley and it in no place recited that it was conveyed to her as her separate property and estate (Defendant's Exhibit No. 6, S. F., Pages 614-616).

The down payment on the home was paid for by an escrow check of $2,600.00, and an additional check in the amount of $15,789.93, (Plaintiff's Exhibits 22 and 22A). The Certified Public Accountant was unable to testify as to what portion of this money came from money on hand prior to marriage and money that was earned during the marriage (S. F. Page 365, Lines 17-23). The monthly payments on the house plus the house improvements and the final liquidation of indebtedness due Security Federal on the house likewise could not be determined to be paid from petitioner's separate property (S. F. Pages 366-367).

8. *Cash in Deposit Box at First National Bank—$37,500.00*: Mr. Likes testified that he was not able to tell the Court how much of this money was on hand prior to the marriage and how much was made during the marriage (S. F. Pages 355, 357, 437). Mr. Likes repeatedly testified that he had never made an audit of the moneys that were in the safety deposit box from time to time (S. F. Page 433); in fact, this Auditor testified in response to a question by the Court that the safety deposit box was used as "A kind of a grab-all—if you couldn't place it any place else you put it in the safety deposit box—in your accounting." (S. F. Page 340, lines 18-24). He further testified that there might be entries in the audit showing money put into the safety deposit box that was never put in and money taken out that was never taken out (S. F. Page 341).

Plaintiff's Exhibits 1 and 2 were envelopes which showed all of the deposits and withdrawals from the safety deposit box in question from December 19, 1944 to June 7, 1951. The petitioner testified that *she just stopped keeping records after this date.* She had no records of any kind in connection with the moneys that she deposited and removed from this safety deposit box (S. F. Pages

120-121); in fact, the petitioner testified both on deposition and at the trial that the property on hand at the time of the divorce hearing was hers because she made every dime of it herself and that it had been made since the marriage but that she is the one who made it (S. F. pages 543-544).

9. *1952 Cadillac Automobile*: Mr. Likes testified that he could not tell whether this car was paid for out of funds the petitioner had prior to her marriage or from earnings made during the marriage (S. F. Page 359, lines 16-20).

10. *Travel Checks and Cash in the Amount of $400.00, and the Cash in the Amount of $3,600.00*: This was money that apparently even the Auditor did not know petitioner had in her possession. He did not include it in his tabulation sheet which is Plaintiff's Exhibit No. 4, and these funds first came to light toward the close of the trial (S. F. Page 595). No effort was made to show that these cash amounts were moneys which the petitioner had on hand prior to the date of her marriage to the respondent.

At least twice the Certified Public Accountant who had looked after the petitioner's books since 1947 was asked to trace the money on hand or which purchased the items of personalty and realty listed above, and he was unable to testify that a single item came from moneys that were on hand prior to the marriage (S. F. Page 399, lines 12-19; S. F. 408-411; S. F. 445).

The Auditor could not testify whether or not the community expenses were paid out of earnings made during the marriage (S. F. Page 437, line 21); whether the income taxes were paid out of earnings (S. F. Page 438 lines 3-9); he could not tell how much capital in the four loan companies or the checking account at the end of any

year was money which Mrs. Stanley had on hand prior to the marriage or was money that had been earned during the marriage (S. F. Page 436, lines 4-8). The same was true as to the checking account column shown on Plaintiff's Exhibit No. 4 (S. F. Page 436, lines 10 through 14).

In connection with all of the foregoing, the Court must keep in mind that this was a small loan business consisting of personal loans from $50.00 to $100.00, and that it was impossible to trace the loans which were made, and to come to any conclusion as to whether the loans were made with money which was on hand prior to the marriage or whether the loans were made with money which was earned during the marriage. Mr. Likes testified that it just couldn't be done (S. F. Page 194).

AUTHORITIES.

Bantuelle v. *Bantuelle*, 195 S. W. 2d 686.
Carle v. *Carle*, 234 S. W. 2d 907, cert. questions ans., 234 S. W. 2d 1002 and 235 S. W. 2d 925.
Earnest v. *Earnest*, 223 S. W. 2d 681.
Gibson v. *Gibson*, 202 S. W. 2d 288.
Gillespie v. *Gillespie*, 110 S. W. 2d 89.
Hardee, Sheriff, v. *Vincent*, 147 S. W. 2d 1072.
Harkness v. *McQueen*, 232 S. W. 2d 629.
Hendrick v. *Hendrick*, 222 S. W. 2d 281.
Kuehn v. *Kuehn*, 259 S. W. 290.
Rippy v. *Rippy*, 49 S. W. 2d 494 (writ ref.).
Schwethelm v. *Schwethelm*, 1 S. W. 2d 911.
Skinner v. *Skinner*, 202 S. W. 2d 318.
Schmeltz v. *Garey*, 49 Texas 49 (S. C.).
Walker-Smith Co. v. *Coker*, 176 S. W. 2d 1002 (Error ref.).

STATUTES.

Article 4619, V. R. C. S., 1925.

ARGUMENT.

This record conclusively shows that all ten of the items of property listed in the foregoing statement were acquired during the marriage of the parties hereto. Article 4619, V. R. C. S., 1925, provides that, except as therein stipulated, all property acquired by either the husband or wife during marriage is presumed to be community property. The statutory presumption further contains that "All of the property which the husband and wife possess at the time the marriage may be dissolved may be regarded as common effects or gains unless the contrary is satisfactorily proved."

These presumptions obtain as to real estate, *Rippy* v. *Rippy*, 49 S. W. 2d 494 (writ ref.). These presumptions obtain as to personal property. In *Walker-Smith Co.* v. *Coker*, 176 S. W. 2d 1002 (error ref.), it was held that merchandise acquired during marriage, although purchased with the wife's separate funds, was presumed to be community property and the husband and wife had the burden of proving its separate ownership as against the execution creditor of the husband.

This presumption as to community property is one of the best established rules in our jurisprudence, whether the claim of separate property is advanced by either the husband or the wife. *Kuehn* v. *Kuehn*, 259 S. W. 290; *Schwethelm* v. *Schwethelm*, 1 S. W. 2d 911; *Gillespie* v. *Gillespie*, 110 S. W. 2d 89; *Bantuelle* v. *Bantuelle*, 195 S. W. 2d 686; *Gibson* v. *Gibson*, 202 S. W. 2d 288; *Hendrick* v. *Hendrick*, 222 S. W. 2d 281; *Earnest* v. *Earnest*, 223 S. W. 2d 681; *Carle* v. *Carle*, 234 S. W. 2d 907, certified questions answered 234 S. W. 2d 1002 and 235 S. W. 2d 924.

In fact, while the earlier cases refer to the language of the statute and require that the showing of separate

property be *satisfactorily* proved, the later cases in Texas hold that the presumption of community character of property acquired by either spouse during the marriage is very strong and can be overcome only by *clear and convincing proof* that it belongs to one or the other of them, and the burden of proving its separate character is always upon him who asserts it. *Skinner* v. *Skinner*, 202 S. W. 2d 318; *Harkness* v. *McQueen*, 232 S. W. 2d 629.

The Honorable Trial Court properly concluded from the evidence and testimony that no single item of property or money could be traced either in the original or converted form in support of the contention of appellant that the same was her separate property, or separate money, or purchased with her separate property which she had on hand prior to her marriage to Respondent.

Petitioner attempted to "satisfactorily prove" that such property was her separate property, as follows:

"Before marriage I had cash or investments totaling $85,954.29, plus bonds and a Cadillac automobile. My husband (appellee) had nothing. After six and one-half years of marriage I have $41,911.93 less than when I was married, and the profits of $84,044.63 made from my business during marriage is also gone." (Summary of petitioner's statement under points 1 through 5).

We have shown the Court the falsity of this statement, but even if true, it is simply an attempt by petitioner to show the amount of property she had on hand prior to marriage followed by the amount of property she had at the dissolution of the marriage and is not sufficient nor satisfactory to discharge the burden of proof required by the above statute and cases. The Court in *Rippy* v. *Rippy, supra*, citing Speer on the Law of Marital Rights, page 434, speaks on this very point:

"The facts that at the marriage the husband had much money and the wife nothing, and that during the marriage relation the parties decreased in fortune, making nothing, will not rebut this presumption unless the purchase money or consideration is explicitly traced to the separate property of the husband." (The statement in quotations is found in 49 S. W. 2d, at page 496).

The same rule was applied in *Gibson* v. *Gibson*, 202 S. W. 2d 288, where the husband owned fixtures and stock-in-trade of a liquor store at the time of marriage, and after marriage continued to buy and sell merchandise but maintained only one bank account in which he mingled profits from sales with his capital investment. The wife upon being granted a divorce was denied any recovery of community property because the inventory, fixtures, stock-in-trade and cash in bank at the time of the divorce was less than at the time of marriage. The appellate Court reversed the decision of the Trial Court and held under Article 4619, V. R. C. S., that the burden was on the husband to show what portion of the community estate was in fact his separate property. The evidence showed that the husband had kept no records as to how much of the capital investment and how much of the profits were used in replenishing the stock, and only showed that at the end of the marirage there was a decrease in the inventory of some $744.21.

The Court in the *Gibson* case stated that the Commission of Appeals in *Hardee, Sheriff*, v. *Vincent*, 147 S. W. 2d 1072, was directly in point. In that case, the husband had given his grocery store to his wife as her separate property and thereafter they operated the business selling the stock-in-trade and replenishing it with new stock. The new stock was paid for out of an account which did not show how much of it was original capital and how much was profits from the business. Later a judgment

was rendered against Vincent, the husband, and a levy was made upon the stock-in-trade of the store. Mrs. Vincent claimed the same was her separate property. Judge Slaton, speaking for the Commission of Appeals said:

> "The proof shows that dry goods and fixtures were purchased on credit and paid for out of funds from the business; that groceries were bought and paid for with cash out of the business. Whether the cash paid for the merchandise and fixtures came out of the capital investment or profits of the business does not appear—Absent proof that the money so used came out of the capital investment, which is the state of the record, the presumption of the law that that property acquired by either husband or wife during marriage belongs to the community estate of the husband and wife, controls in the present case."

The above rule of law has been consistently followed in Texas since the early Supreme Court decision in *Schmeltz* v. *Garey*, 42 Texas 49, wherein the evidence disclosed the husband to have over $100,000.00 worth of assets at marriage, and much less than this at the time of the divorce. The Court held that this was not sufficient and the evidence was too indefinite to rebut the presumption established by the statute, that property acquired during marriage is community property. The Court further stated that this was not a case where specific property, proven to have been separate estate was exchanged; but a case in which it was necessary to trace the means through mutations and changes, and this should have been done "clearly and indisputably."

Respondent respectfully submits that petitioner failed to discharge the burden of satisfactorily proving that all, or any part of the community estate was her separate property in its original or converted form or was purchased with property she possessed before marriage. Wherefore, respondent prays that the judgment of the Trial Court be affirmed.